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15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 OAKLAND DIVISION

18 IN RE COLLEGE ATHLETE NIL  
19 LITIGATION

Case No. 4:20-cv-03919 CW

20 PLAINTIFFS' NOTICE OF MOTION AND  
21 MOTION TO MODIFY CASE  
22 SCHEDULE; MEMORANDUM OF  
23 POINTS AND AUTHORITIES IN  
24 SUPPORT THEREOF  
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**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE THAT Plaintiffs respectfully ask this Court, pursuant to Federal Rule of Civil Procedure 16(d) and Local Rules 6-3 and 16-2(d), for a modification to the schedule set forth in the Court's November 5, 2021 Stipulation and Order Extending Case Deadlines (ECF No. 175).

This motion is based upon this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the Proposed Order Granting Plaintiffs' Motion for to Modify Case Schedule, the Declaration of Steve W. Berman ("Decl.") filed herewith, all matters with respect to which this Court may take judicial notice, and such oral and documentary evidence as may be presented to the Court.

1 **I. INTRODUCTION**

2 Partly in response to the unanimous Supreme Court decision in *Alston*, on July 1, 2021,  
3 Defendants made paradigm-altering rule changes that for the first time allowed college athletes to  
4 earn money from their NILs. As Plaintiffs have long predicted, this unleashed massive, pent-up  
5 demand leading to an explosion of NIL deals, which have been evolving and growing in the types of  
6 deals and number of athletes benefitting ever since. Meanwhile, consumer demand for college sports  
7 remains as high as ever.

8 From the case’s outset, Plaintiffs have diligently pursued discovery. Particularly relevant  
9 here, since the July 2021 rule changes, Plaintiffs have doggedly sought discovery about this ongoing  
10 and revolutionary NIL environment to provide crucial data for their class certification experts to  
11 show how, *e.g.*, injury may be proven classwide. Similar to *Alston*, the best data about how much  
12 college athletes would have earned since 2016 in the “but for” world without unlawful restraints is  
13 the real-world NIL revolution occurring right now. So, Plaintiffs have subpoenaed approximately  
14 150 schools and online platforms for NIL data because Defendants don’t have it. But given that  
15 Defendants changed the rules of the game only nine months ago, and due to the challenges of  
16 obtaining data from so many sources, Plaintiffs need a modification to the June 22, 2022 class  
17 certification deadline so they can collect sufficient data on the new NIL environment—including  
18 data about recent deals promising widespread NIL benefits—and provide their experts with sufficient  
19 time to organize and analyze that data.

20 To that end, Plaintiffs requested that Defendants stipulate to an extension of the class  
21 certification deadline to October 21, 2022 (and corresponding extensions to subsequent deadlines).  
22 Defendants said that they would only agree if Plaintiffs acceded to unreasonable concessions,  
23 including agreeing not to serve additional document requests (though merits discovery does not close  
24 even under the current schedule until March 27, 2023). Defendants made no claim that the schedule  
25 modification would prejudice them. Plaintiffs declined and now seek relief from the Court.

26 **II. STATEMENT OF RELEVANT FACTS**

27 Plaintiffs have diligently pursued discovery from the beginning of the case. Less than two  
28 weeks after written discovery commenced, on December 2, 2020, Plaintiffs served 44 document  
MOTION TO MODIFY CASE SCHEDULE

1 requests on each of the six Defendants. *See* Declaration of Steve W. Berman (“Decl.”), concurrently  
2 filed herewith, ¶ 3. The parties then engaged in lengthy meet-and-confers in spring 2021. When  
3 Defendants requested a three-month extension to the deadline to substantially complete production of  
4 these documents, Plaintiffs stipulated to move the deadline to August 31, 2021 (and to extend  
5 subsequent deadlines correspondingly). *Id.* ¶ 4; *see* ECF Nos. 150, 151.

6 In the meantime, following the Supreme Court’s June 21, 2021 decision in *NCAA v. Alston*,  
7 141 S. Ct. 2141 (2021), affirming this Court’s trial order, and the Court’s June 24, 2021 order in this  
8 case largely denying Defendants’ motion to dismiss (ECF No. 152), Defendants announced  
9 monumental (albeit “interim”) changes to their NIL rules commencing July 1, 2021. Following years  
10 of enforcing rules that completely forbid college athletes from receiving anything of value for the  
11 commercial use of their NILs—and asserting that allowing *any* NIL compensation would be  
12 disastrous for college sports—the NCAA adopted an interim NIL policy stating that, *inter alia*,  
13 college athletes would now be permitted to receive many forms of NIL compensation. *See*  
14 Consolidated Amended Complaint (“Complaint” or “Compl.”) ¶¶ 4, 9, 19, 21-22, 259 (ECF No.  
15 164). Plaintiffs then filed their amended Complaint on July 26, 2021, with Defendants answering on  
16 September 22, after Plaintiffs stipulated to a one-month extension. *See* ECF Nos. 164-172.

17 To understand what precipitated the NIL rule changes, why Defendants persist with certain  
18 restraints, and to discover information about recently announced potentially seismic changes to the  
19 NCAA governing structure (including a newly formed Constitution Committee), Plaintiffs requested  
20 that Defendants supplement their production of documents in response to the first set of requests and  
21 served a second set of document requests on September 1, 2021. Decl. ¶ 6. After meeting and  
22 conferring, the parties stipulated to substantial completion of these documents’ production (and  
23 Plaintiffs’ supplemental production) by April 1, 2022, to move the class certification deadline to June  
24 22, 2022, and to extend subsequent deadlines by similar amounts of time. ECF Nos. 174, 175.

25 Most relevant here, Plaintiffs have sought data and documents about the ongoing NIL  
26 payments from third parties, which is necessary to show how this case can proceed as a class action.  
27 Because Defendants do not systematically collect NIL data, Plaintiffs have subpoenaed numerous  
28 third parties (more than 200), including approximately 150 NCAA schools, many of whom are  
MOTION TO MODIFY CASE SCHEDULE

1 required to keep records of NIL deals by state law or school policy. Decl. ¶ 8. Plaintiffs started the  
2 process quickly, issuing subpoenas to schools in September 2021, but it has been an arduous and  
3 complex undertaking, involving over a hundred individual negotiations with schools that never  
4 previously collected NIL data. Plaintiffs have been working with these schools through, *inter alia*,  
5 confidentiality protections, such as the Family Educational Rights and Privacy Act (FERPA, given  
6 the sensitive nature of student-specific and commercial data), and understanding how the data is  
7 relevant and may be collected and produced (some schools are collecting themselves, others are  
8 using third party platforms). This required, *inter alia*, guiding nearly all schools through the lengthy  
9 FERPA notice process, modifying the protective orders for nearly a dozen schools, and moving to  
10 compel production from schools that refused to produce. Though close to a hundred schools have  
11 produced *some* documents, many have yet to produce the seminal NIL deal data. Plaintiffs are  
12 negotiating with them to produce that data via initial or supplemental productions to capture as much  
13 of the academic year as possible. That is critical to gathering information about the NIL deals for  
14 winter ('21-'22) and spring ('22) sport athletes and more generally about the rapidly developing NIL  
15 marketplace, with recent deals involving ever broader groups of students. *Id.* ¶ 9.

16 Indeed, since Defendants' rule changes only nine months ago, there has been an explosion of  
17 NIL deals involving thousands of college athletes. For example, Built Brands, LLC announced a deal  
18 that will provide NIL compensation to every member of the BYU football team, including tuition  
19 reimbursement for all walk-on players. In February 2022, it was reported that Grambling State  
20 University has plans for a deal that will provide NIL compensation to all of the school's scholarship  
21 athletes. Only a few weeks ago (on March 23, 2022), Adidas announced a new NIL network that will  
22 enable any college athlete at a NCAA Division I Adidas-sponsored school—covering more than  
23 50,000 students across 23 sports at 109 schools—to become a paid spokesperson for the brand. And  
24 this is just the tip of the iceberg. *See* Decl. ¶¶ 10-16, Exs. A-F.

25 In light of these facts, Plaintiffs request a four-month extension of the class certification  
26 deadline, from June 22 to October 21, 2022. That will permit Plaintiffs to obtain data from schools  
27 and third parties for as close to a full year after Defendants' rule changes as possible, to capture data  
28 about the recently announced NIL deals, and to then have Plaintiffs' experts assemble and assess  
MOTION TO MODIFY CASE SCHEDULE

1 what will be a massive dataset for their reports. As soon as Plaintiffs realized this, months in advance  
2 of the June deadline, they requested that Defendants stipulate to an extension. Defendants refused,  
3 unless Plaintiffs would make concessions that are unacceptable to the classes: “Defendants oppose a  
4 4-month delay in class certification briefing at this time. We would, however, be willing to agree to  
5 Plaintiffs’ request under the following two conditions: (1) Plaintiffs agree not to seek a further  
6 extension in class certification briefing beyond these 4 additional months; and (2) Plaintiffs agree not  
7 to serve any further RFPs on Defendants.” Decl. ¶ 19, Ex. G.

### 8 III. ARGUMENT

9 “Federal Rule of Civil Procedure 16(b) provides that a case management schedule can be  
10 modified upon a showing of good cause and by leave of the district judge.” *Centrify Corp. v. Quest*  
11 *Software, Inc.*, 2011 WL 6303362, at \*2 (N.D. Cal. Dec. 16, 2011) (Wilken, J.). “The district court  
12 may modify the pretrial schedule if it cannot reasonably be met despite the diligence of the party  
13 seeking the extension.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)  
14 (internal quotation marks omitted).<sup>1</sup>

15 Plaintiffs have diligently pursued discovery from Defendants and third parties, including  
16 efforts to negotiate productions of NIL data from approximately 150 schools, which have been  
17 understandably lengthy and complex, given the novelty of the data and confidentiality issues  
18 implicated. Important NIL deals also have materialized in connection with winter (’21-’22) and  
19 spring (’22) sports—including in relation to March Madness—and the related data can’t be produced  
20 until after those months pass. The evolving NIL market makes clear that Plaintiffs’ experts will  
21 benefit from having as close to a year’s worth of data as possible before moving for class  
22 certification. Granting the extension would also permit Plaintiffs to obtain discovery regarding the  
23 large-scale NIL deals that have only recently been made public, including about Adidas’s “NIL  
24 network,” announced on March 23, 2022, which will create NIL opportunities for more than 50,000  
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26 <sup>1</sup> See also *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2014 WL 4954634, at \*2 (N.D. Cal.  
27 Oct. 1, 2014) (“[C]entering the good cause analysis on the moving party’s diligence prevents parties  
28 from profiting from carelessness, unreasonability, or gamesmanship, while also not punishing parties  
for circumstances outside their control.”).

1 student-athletes. Analyzing all of that data will then take the experts several months. It would be  
2 inefficient for the Court to have class certification briefed before this data is obtained, which could  
3 cause a need for supplemental class certification briefing in the future.

4 This Court has explained that the focus of the inquiry when a schedule modification is  
5 requested should be the reasons for seeking the modification, but that potential prejudice to the party  
6 opposing the motion may also be relevant. *See Centrifly Corp.*, 2011 WL 6303362, at \*2. Plaintiffs  
7 submit that the June 22 class certification deadline cannot be reasonably met, and that an extension  
8 to October 22, 2022 is justified. *See Olberg v. Allstate Ins. Co.*, 2020 U.S. Dist. LEXIS 46229, at \*3-  
9 \*5 (W.D. Wash. Mar. 17, 2020) (granting extension to class certification deadline to allow plaintiffs  
10 to conduct discovery “to properly support their motion for class certification,” which “will in turn  
11 enable the Court to perform its ‘rigorous analysis’ of Plaintiffs’ motion for class certification”).

12 Conversely, Defendants would not be prejudiced. In fact, they could actually benefit from  
13 having a more complete record for Plaintiffs’ and Defendants’ experts to analyze at class  
14 certification. Defendants’ tacit acknowledgement that they would not be prejudiced is shown by their  
15 March 28 email, wherein they say they would agree to the four-month extension, as long as they can  
16 extract two unreasonable concessions from Plaintiffs. Indeed, even though under the *current*  
17 schedule fact discovery does not close until March 27, 2023, Defendants demand that Plaintiffs agree  
18 not to serve additional document requests, which is particularly unreasonable given the potential  
19 need to discover additional information about the rapidly evolving NIL rules and marketplace and  
20 NCAA governance structure. And while Plaintiffs have no plans to seek a further class certification  
21 extension, they cannot foreclose that possibility either, for the same reasons. Defendants remain  
22 free, in any event, to oppose any additional requests for discovery or extensions of time.

#### 23 IV. CONCLUSION

24 For the foregoing reasons, pursuant to Federal Rule of Civil Procedure 16(d) and Local Rules  
25 6-3 and 16-2(d), Plaintiffs respectfully request that the Court extend the class certification deadline  
26 from June 22 to October 21, 2022, and modify all subsequent deadlines by the same amount of time,  
27 as identified in the attached Proposed Order.

1 DATED: April 4, 2022

Respectfully submitted,

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